

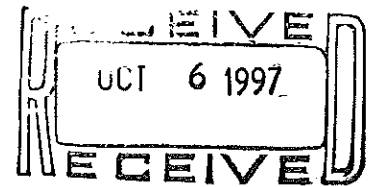
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October 6, 1997

139629
S. C. PUBLIC SERVICE COMMISSION



DANIEL S. LEWIS
(1940-1981)

✓ Hand delivered MR
ARW I new

The Honorable Charles W. Ballentine
Executive Director
Public Service Commission of South Carolina
111 Doctor's Circle
Columbia, South Carolina 29203

HAND DELIVERED

Re: Blue Ridge Electric Cooperative, Inc. vs. Duke Power Company, n/k/a Duke
Power, a division of Duke Energy Corporation (Docket No.: 97-153-E)

Dear Mr. Ballentine:

Enclosed please find an original and ten (10) copies of Duke Power, a division of Duke Energy Corporation's **Petition for Reconsideration and/or Rehearing** in the above referenced case. Copies have been served on all parties listed on the attached Certificate of Service. With kind personal regards, I am

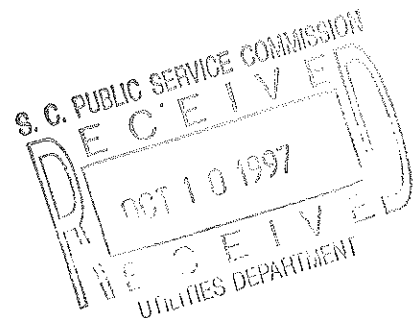
Very truly yours,

A handwritten signature in cursive script, appearing to read "Rich".

Richard L. Whitt

RLW:tct
Enclosures

cc: parties of record



POSTED
MR 10/10/97

S. C. PUBLIC SERVICE COMMISSION
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OCT 10 1997
RECEIVED
UTILITIES DEPARTMENT

RETURN DATE: Rec'd On 9/25
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2. As permitted by S.C. Code Ann. § 58-9-1200 (1976), and § 1-23-380 (1986), and the Commission's Rules of Practice and Procedure, S.C. Code Ann. Regs. 103-836, 103-842 and 103-881, Duke respectfully petitions the Commission for Reconsideration and/or Rehearing of the following matters. In support of this Petition, Duke respectfully shows as follows:

3. In its Order denying Duke's right to serve Nason, this Commission failed to address Duke's argument. This failure is evidenced by this Commission's reliance upon findings that are not relevant to the resolution of the legal issue presented.

Duke asserts that under Section 58-27-620(1)(d)(iii), it has a right to honor Nason's request for service because Nason's plant lies partially within three hundred feet (300') of where a Duke line was located on July 1, 1969. The critical issue in this matter is whether Duke's original 44 kv electric conductor, the "Darby line," was a "line" within the meaning of Section 58-27-610(3). If the Darby line qualifies as a "line", its location on July 1, 1969, serves as a geographic "marker" and this line defines the area within which Duke may provide service if requested by a customer. Under the second proviso of Section 58-27-610(3) the Darby line qualifies as a "line" without regard to the line's actual or intended use because it had a capacity between 25 kv and 48 kv. Therefore, Duke has a right to honor Nason's request for service.

4. In the Order, this Commission misapprehends the evidence of record. Namely, the Order states that, "The testimony at the hearing showed that the presently existing 44kv line that is the subject of this matter was constructed in 1974, and serves as a transmission tie line between Westminster and Walhalla" (See Order at page 3). This is incorrect:

a) **The Order incorrectly finds that the 44 kv line was constructed in 1974.**

The testimony shows that the 44 kv line was constructed and finished on April 18, 1969 (See testimony of Mark E. Johnson, page 2 lines 21-22).

There may be confusion because the 44 kv line was renamed the, "Bear

Swamp" 44 kv line (See testimony of Mark E. Johnson, page 3 line 3). In fact, the 44 kv line came into service in 1969 and a line has been in continuous operation since that date (See testimony of Mark E. Johnson, page 3 line 7) (See hearing cross-examination by counsel for Blue Ridge in transcript). Additional testimony was furnished by Edward T. Connell that conclusively showed that the 44 kv line on the Hearing Exhibit provided by Duke is the same line extant today (See testimony of Edward T. Connell, page 4, lines 6-16). In light of this testimony, the Commission's Order is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

- b) **The Order incorrectly finds that the 44 kv line serves as a Transmission tie line between Westminster and Walhalla.** In fact, Duke provided testimony of record that shows that the 44 kv line functions as a Distribution line, with the majority of its energy used to serve the Steel Huddle Plant. Giving the term Distribution line its plain English meaning, a Distribution line is a line which distributes electricity to or serves an electric customer. Furthermore, the Commission's own Order also finds that the line functions as a Distribution line by acknowledging that Steel Huddle is served off of the 44 kv line (See Order 97-819, page 3). However, there was testimony of record that shows that the companion **100 kv line** serves the Walhalla tie station and not the 44 kv line (See testimony of Mark E. Johnson, page 3 lines 4-5). In light of this testimony, the Commission's Order is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

5. **The Commission's Order mistakenly** assigns significance to the uncontroverted fact that, "... if [Duke] were to serve Nason, that a new line would have to be built, and the plant would not be served from the existing line" (See Order at page 3). This fact is irrelevant. Because the Nason premises is one that Duke may legally serve, Duke may choose to construct another line to effect that service. In fact, the Commission's Order ignores the fact that Duke provided uncontroverted testimony that an additional line would be constructed to serve the Nason premises because the additional line would be the most economic manner to serve the premises (See testimony of Stephen R. Goza, page 2, line 7 through page 3, line 2). In light of this testimony, the Commission's Order is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

6. **This Commission's Order mistakenly asserts**, "We do not believe that the line in question is a distribution line under the facts of this case, but [it] is a transmission line" (See Order at page 3). See discussion herein at 4(b) hereinabove. In light of this testimony, the Commission's Order is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

7. **The Commission's Order mistakenly asserts** that Duke is claiming corridor rights in order to serve Nason (See Order at page 3). Throughout this proceeding, Duke has maintained that the Commission's earlier Order No. 16,394 issued in Docket No. 15,972 on September 5, 1972, (hereinafter, "the 1972 Order") left the three hundred foot (300') area around the 44 kv line unassigned, making the service of the Nason plant a customer choice question. A review of the 1972 Order shows just such a holding by this Commission. This Commission's decision in the Order for which reconsideration is requested, is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

8. **The Commission's Order mistakenly asserts** that, "Even if Duke could have claimed corridor rights with the original 44 kv transmission line, this line is now clearly a 100 kv transmission line. As the 1969 'Darby' 44 kv line no longer exists, any corridor rights that Duke may have had no longer exist" (See Order, page 4). This is contrary to the evidence of record, which shows that the original 44 kv Transmission line is still present and in service (See Cross-Examination of Duke's witnesses by Blue Ridge's Counsel). Duke's witnesses assertions were not contradicted by any witness appearing before this Commission. In light of this testimony, the Commission's Order is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

9. **The Commission's Order mistakenly asserts** that, "There was no evidence presented at the hearing that this was ever the intent or agreement of the parties" (See Order, page 4) The particulars of the give and take of the negotiations, which led to the 1972 Order, are lost in time. What is preserved in the record is that signatories for Duke and Blue Ridge, signed Exhibit 1 to the 1972 Order, and asked this Commission to find, which it did, "... the areas in Oconee County situated more than three hundred (300') feet from the lines of any electric supplier and outside the corporate limits of any municipality are assigned to the respective applicants **or designated unassigned**, all as shown on Exhibit A incorporated herein by reference and made a part of this Order as fully as if set out herein" (emphasis supplied) (See the 1972 Order). The Commission's present Order simply ignores this clear and unequivocal language in the 1972 Order. The Commission's decision, therefore, is made upon unlawful procedure, affected by other error of law. The Commission's decision to disregard the 1972 Order is arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

10. **The Commission's Order mistakenly asserts that**, "There is no specific language or discussion in the 1972 Order that references any unassigned territory relating to any specific

lines." As shown in number 9 hereinabove, the Order specifically addresses, "... the lines of any electric supplier... all as shown on Exhibit A incorporated herein" (See 1972 Order). The Commission's Order disregards the 1972 Order's specific holding and the Commission's actions are arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

11. **The Commission's Order is affected by other error of law and made upon unlawful procedure** because this Commission's 1972 Order prevents this Commission and Blue Ridge from re-litigating the question of whether the 44 kv line is a protected "line" under the principles of *Res Judicata*, Collateral Estoppel and Estoppel by Judgment. This issue was settled by written agreement of the parties and memorialized on the Exhibit relied on in the Docket which led to the 1972 Order of the Commission.

Without waiving any foregoing basis for its request for Reconsideration and/or Rehearing, and expressly incorporating the same, Duke asserts that its substantial rights have been prejudiced because the Commission's findings, interferences, conclusions and decision are:

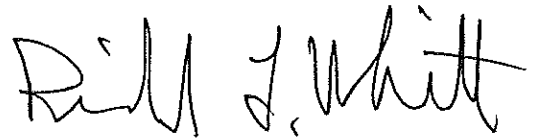
- (a) in violation of constitutional or statutory provision;
- (b) in excess of the statutory authority of the Commission;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

CONCLUSION

In the Order, this Commission's Order was made upon unlawful procedure, was affected by other error of law, was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record and was arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion, and the relief requested in the Petition of Blue Ridge should be denied upon this request for Reconsideration and/or Rehearing.

WHEREFORE, Duke respectfully requests that this Commission Rehear and/or Reconsider each erroneous finding of fact and/or conclusion of law addressed above.

Respectfully Submitted,



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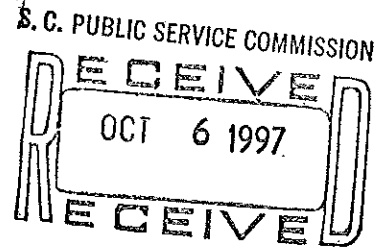
ATTORNEYS FOR PETITIONER
DUKE POWER, A DIVISION OF
DUKE ENERGY CORPORATION

Columbia, South Carolina

Dated: October 6, 1997

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NO.: 97-153-E



Blue Ridge Electric Cooperative, Inc.,)
)
Petitioner,)
)
vs.)
)
Duke Power Company, n/k/a Duke Power,)
a division of Duke Energy Corporation,)
)
Respondent.)
)
_____)

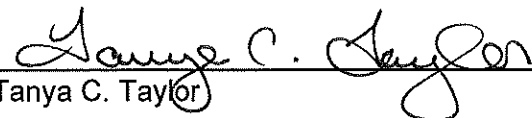
CERTIFICATE OF SERVICE

I, the undersigned, an employee of Austin, Lewis & Rogers, P.A., do hereby certify that I have served the foregoing **Petition for Reconsideration and/or Rehearing**, by hand delivering a copy of the same to the following individuals:

Steven W. Hamm, Esquire
Richardson, Plowden, Howser, Carpenter & Robinson
1600 Marion Street
Columbia, SC 29201

The Honorable Gary E. Walsh
Deputy Executive Director
The Public Service Commission of South Carolina
111 Doctor's Circle
Columbia, South Carolina 29203

F. David Butler, Esquire
General Counsel
The Public Service Commission of South Carolina
111 Doctor's Circle
Columbia, South Carolina 29203


Tanya C. Taylor

Dated: October 6, 1997

Columbia, South Carolina